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In the Supreme Court of the United States

October Term, 1980

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

vs.

WILLIAM A. PASCARELL, Acting Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF AMICUS CURIAE IN OPPOSITION

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF AMICUS CURIAE IN OPPOSITION

Amicus curiae, American Trucking Associations, Inc. ("ATA"), charging party before the National Labor Relations Board in this case, respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the opinion of the Court of Appeals for Third Circuit. Petitioners' and Respondent's letters of consent to ATA's *amicus* status are on file with the clerk of this Court.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals, not yet reported, appear as Appendices A and B in the Petitioners' Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. ("App. A" and "App. B")[1]

Petitioners' Appendix also includes as Appendix C the transcripts of the January 5, January 12, and February 23, 1981, hearings before the Honorable Judge Herbert J. Stern of the United States District Court for the District of New Jersey.[2] Judge Stern's order granting the preliminary injunction, rendered orally on February 23, 1981, is included in Appendix C. (App. C at 176a-191a)

STATUTES INVOLVED

Section 10(l) of the National Labor Relations Act ("Act"), 29 U.S.C. §160(l). (App. D at 207a-208a)[3]

United States Constitution, Article I, Section 8. (*Amicus* App. A)

United States Constitution, Article III, Section 1. (App. D at 207a)

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1. References to the transcripts are hereinafter cited as "App. ..... at ....."

2. On January 5, 1981, Judge Stern denied a temporary restraining order. This decision had no bearing on the Third Circuit appeal. Contrary to Petitioners' assertion, Judge Stern's remarks to counsel on January 5 and 12, and on February 23 prior to rendering his opinion, do not constitute part of the decision reviewed by the Third Circuit and are not material to Petitioners' request for a writ of certiorari.

3. Petitioners' Appendix D contains two of the three statutory and constitutional provisions involved in this case.

STATEMENT OF THE CASE

Nature of the Case

This case arises from a statutory proceeding under §10(l) of the Act. Section 10(l) requires the General Counsel of the National Labor Relations Board, after investigating an unfair labor charge alleging conduct unlawful under §§8(b)(4) or 8(e) of the Act and after concluding that reasonable cause exists to believe the charge is true, to petition a United States district court for injunctive relief from the actions of the Petitioners pending the Board's final disposition of the charges. Section 10(l) authorizes district courts to issue such relief.

Petitioners seek to have reviewed the question whether the district court erroneously granted the injunction based allegedly merely on the representation by the General Counsel of a not "frivolous and insubstantial" legal theory despite the fact that the court determined the legal theory to be erroneous. (Pet. Question 1) However, both the district court and the court of appeals merely found that based on an evaluation of the evidence presented to the court, the General Counsel had reasonable cause to believe a violation was occurring. (App. C at 185a, 189a, 191a; App. A at 7a) Therefore, the true nature of the petition is simply a request that this Court review the appropriateness of the findings below and the issuance of the injunction.

Background of the Case

ATA, the International Association of Non-Vessel Operating Common Carriers ("NVOCCs"), and Twin Express, Inc. each filed unfair labor practice charges on or about December 19, 1980, alleging that Petitioners had violated §§8(b)(4)(i) and (ii)(A) and (B) and 8(e) by entering into, on December 6, 1980, the International Long-

shoremen's Associations ("ILA") Rules on Containers ("Rules") as a consequence of ILA threats and coercion. The Rules seek to secure for ILA labor the work of stuffing and stripping containers originating from or destined to points within 50 miles of seaports on the Atlantic and Gulf coasts.[4]

Petitioners enforced the Rules beginning January 1, 1981. (JA 8l.; 8m. at 446; 8i. at 341; 8u. at 655-56)[5] Having investigated the December, 1980 charges the General Counsel of the Board concluded that the Rules unlawfully sought work neither functionally nor historically related to traditional ILA work. The General Counsel also concluded that the neutral employers of ILA labor could not legally assign the sought-after work to their ILA represented employees. (App. C at 132a and 173a-174a)

On January 5, 1981, the General Counsel petitioned the United States District Court for the District of New Jersey for a temporary restraining order and injunction under Section 10(l) prohibiting enforcement of the Rules. Judge Stern denied the requested temporary restraining order that same day. On January 12, 1981, after hearing arguments by the parties, the court ordered the parties to submit affidavit evidence and briefs so that it could determine whether a preliminary injunction should issue, and if so, in what form.

The parties submitted to Judge Stern affidavit evidence and briefs. (JA 8a.-9 l.) On February 23, 1981,

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4. This Court previously considered the Rules in *NLRB v. ILA*, 447 U.S. 490 (1980). This Court remanded to the Board two consolidated cases, *Associated Transport, Inc.*, and *Dolphin Forwarding, Inc.*, for consideration of precisely the same legal theories which the General Counsel advanced before Judge Stern.

5. "JA" refers to the Joint Appendix in the Third Circuit proceedings.

Judge Stern heard final arguments from the parties before reading his prepared opinion from the bench. (App. C at 158a and 176a-191a)[6] He held that the General Counsel had presented facts and a substantial and not frivolous legal theory which provided reasonable cause for him to believe Petitioners had and were violating the secondary boycott provisions of the Act. (App. C at 185a, 189a, 191a) He issued an injunction prohibiting enforcement of the Rules which became effective February 27, 1981.

Petitioners' request that the Court of Appeals for the Third Circuit stay the injunction was denied on March 7, 1981. The Third Circuit granted expedited consideration of the Petitioners' appeal, and on May 20, 1981, affirmed Judge Stern's decision. (App. A) The Court of Appeals concluded that the district court had jurisdiction to entertain the Board's §10(l) petition, notwithstanding that some of the prior cases had been appealed to and were later remanded by the court of appeals. (App. A at 6a-7a) The court agreed that the General Counsel had reasonable cause to believe a violation existed. (App. A at 7a-8a) The court also concluded that the phrase "just and proper" in §10(l) would permit denial of an injunction

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6. Between the January 12 and February 23, 1981 hearings the Board, pursuant to orders dated January 19, February 18 and February 20, 1981, had consolidated and ordered expedited consideration of the December, 1980 charges and eight other Rules cases already pending before the Board. *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978); *International Longshoremen's Ass'n (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977); *International Longshoremen's Ass'n, Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. No. 171 (1979); *International Longshoremen's Ass'n (Consolidated Express, Inc.)* 221 N.L.R.B. 956 (1975) ("*Conex*"); *International Longshoremen's Ass'n (The Terminal Corp.)*, 250 N.L.R.B. No. 4 (1980); *International Longshoremen's Ass'n (Hill Creek Farms, Inc.)*, Case No. 4-CC-1133, 4-CE-55 (1980); *International Longshoremen's Ass'n, Local 1416 (Custom Brokers & Forwarders Ass'n of Miami Beach, Inc..)*, Case No. 12-CE-30 (1980); and *International Longshoremen's Ass'n, Local 1359 (Beck Arabia, Ltd.)*, 245 N.L.R.B. No. 172 (1979).

if there existed no actual threat that the unfair labor practice charged before the Board would continue, but that the instant case did not present such a situation. (App. A at 8a)

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Instant Case Does Not Involve Petitioners' Questions Nos. 1 and 2

Petitioners' Question No. 1 assumes that in the instant case the General Counsel presented only a theory of law, and that Judge Stern found that theory erroneous. Question No. 2 assumes that the Third Circuit in this case required "automatic" issuance of a §10(1) injunction without considering whether the requested relief was "just and proper." Neither assumption is true; the instant case raises neither question.

The General Counsel submitted to Judge Stern 600 pages of affidavit evidence developed in an extensive investigation following the Court's decision in *NLRB v. ILA*, *supra*. (JA 8a.-8 ll.) To this evidence the General Counsel applied the right of control and work preservation legal theories which the Court had instructed the Board to consider on remand. Judge Stern expressly found neither theory erroneous. In his opinion he reasoned:

> The heart of the dispute before me today does not concern, really, the ultimate outcome of the controversy. This Court . . . is not being called upon to decide whether the union is right that it is work preservation or the charging parties are right that it is work acquisition. That is certainly not at stake. (App. C at 183a)

After considering the evidence and arguments Judge Stern held that the history of the litigation and the record:

> amply demonstrate that counsel for the Board is quite correct, that the position of the charging parties is certainly not unreasonable and non-frivolous. (App. C at 191a)

Moreover, the Judge believed that:

> the issues presented . . . for decision by the Board, can go either way; that both parties' positions are reasonable and non-frivolous. (App. C at 182a; 190a)

He clearly did not find a lack of evidence to support the petition or that the General Counsel's legal theory would not prevail before the Board.

Likewise, contrary to the suggestion of Question No. 2, in its opinion below the Third Circuit did not require automatic issuance of §10(l) relief without considering whether such relief was just and proper. Rather, the court cited one application of that phrase, a district court could decline an injunction if no threat existed that the unfair labor practice charged before the Board would continue. (App. A at 8a) The Third Circuit never stated or implied that this circumstance constituted the "only circumstance" where a district court could properly apply the just and proper standard. (Pet. at 12, n. 12)

The facts assumed by Questions No's. 1 and 2 simply do not exist in the instant case, so these issues should not be reviewed by the Supreme Court.

2. The Various Circuits of the Court of Appeals Have Interpreted §10(l) Consistently

There is no split in the circuits on the interpretations of Section 10(l). The section requires the General Counsel to petition for injunctive relief if he has "reasonable cause" to believe a charge alleging a violation of the Act's

secondary boycott provisions is true. Upon the filing of such a petition a district court has jurisdiction to grant "such injunctive relief . . . as it deems just and proper." (App. D at 207a-208a) The statute was designed to require courts to defer analysis and decision on the merits of the alleged violation to the Board if it appears a violation might exist rather than to judicially decide the merits. All circuits of the court of appeals which have interpreted §10(l) have practiced such a deferred policy.

There is likewise no serious conflict between circuits as to the mandate of §10(l) or the criteria required for the issuance of an injunction. Petitioners have simply conjured a "four-way split among the circuits" as to the standards for an injunction (Pet. at 11) by emphasizing the semantic differences in words used by various circuits and ignoring the action of the courts.

a. Reasonable Cause Criteria

Under the Third Circuit's interpretation of the "reasonable cause" requirement, the agent acting on behalf of the General Counsel must:

> demonstrate that he has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory upon which he proceeds is 'substantial and not frivolous.' (Citations omitted)
>
> *Hirsch v. Building and Construction Trades Council*, 530 F.2d 293, 302-303 (3rd Cir. 1976).

This "substantial and not frivolous" standard requires a showing that the theory is " 'within the range of rationality,' and may well be sustained by the Board. (Citations omitted.)" *Squillacote v. Graphic Arts International Union*, 540 F.2d 853, 859 (7th Cir. 1976). Petitioners agree

that the Fifth,[7] Seventh, Eighth and Ninth Circuits concur entirely in the Third Circuit's view of §10(l)'s reasonable cause requirement. (Pet. at 9)

The cases relied on by the Petitioners demonstrate that the approach of other circuits differs only in the words they use in requiring both deference to the Board's expertise and the exercise of judicial power. The First, Second, Fourth, Sixth and Tenth Circuits all approach §10(l) proceedings with great deference to the General Counsel's factual and legal position. In *Humphrey v. International Longshoremen's Association*, 548 F.2d 494, 498 (4th Cir. 1977), the Fourth Circuit in 1977 granted injunctive relief prohibiting enforcement of the ILA's Rules. It required only a "reasonable possibility that the Board will ultimately enter an enforceable order." 548 F.2d at 498. The court admonished that "the function of the district court is not to decide the merits of the case but to determine whether the Regional Director has reasonable cause to believe that the respondents are violating the Act. (Citations omitted.)" 548 F.2d at 498. It further instructed that "the General Counsel's resolution of disputed issues of law and fact should be accorded considerable deference in determining whether such possibility exists." 548 F.2d at 498.

Likewise, in *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2d Cir. 1980), the Second Circuit affirmed issuance of injunctive relief, stating the following as a governing principle:

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7. The Fifth Circuit accepted the Third Circuit's standard in *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 789 (5th Cir.), *reh. denied*, 480 F.2d 924 (5th Cir. 1973). It did not change its view in *Baldovin v. International Longshoremen's Association*, 626 F.2d 445, 454 (5th Cir. 1980), where it simply found that the Board lacked jurisdiction of the dispute because the activities complained of did not affect commerce. Rather, in *Baldovin* the court cited *Boire* with approval. 625 F.2d at 454.

> With respect to issues of fact, the Regional Director "should be given the benefit of the doubt," (Citations omitted), and on questions of law, the Board's view should be sustained unless the court is convinced that it is wrong. (Citations omitted.)

In *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers,* 494 F.2d 1230, 1245 (2d Cir. 1974) the Second Circuit stated that in a §10(1) proceedings a district court must be "hospitable" to the Board on both the facts and the law, and only deny injunctive relief if the court is "convinced" that the General Counsel's legal position is wrong.[8]

The Third Circuit did not in this case nor has it in any case held that a district court must always issue an injunction despite being convinced that the General Counsel's legal theory is erroneous. In *Samoff v. Building and Const. Trades Council,* 475 F.2d 203, 207 (3rd Cir.), *vacated and remanded with instructions to dismiss as moot, Building & Const. Trades Council v. Samoff,* 414 U.S. 808 (1973), the court held that having found the Board's legal theory *"thoughtfully presented and not frivolous"* a district court

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8. The Court made it clear that because the General Counsel's theory was being advanced for the first time in the 14-year history of the Act and ran counter to previous Board cases on the subject matter, it would not enforce the Board's order if it found a violation on the basis of the facts and legal theories presented in the 10(1) proceedings. 494 F.2d at 1239, 1245. Notwithstanding a failure to expressly adapt the insubstantial and non-frivolous test, it is apparent that the court applied this or a similar standard in denying the injunction. The Second Circuit in *Danielson* expressed disagreement with *Samoff.* However, Petitioners' inability to cite a single case since *Samoff* in which the Third Circuit has required issuance of an injunction in the face of a district court judgment finding the Board's legal theory erroneous demonstrates that the Third Circuit standard does not accord the excessive deference which the Second Circuit anticipated. Even assuming *arguendo* that the Second Circuit standard is a shade more strict, it is irrelevant to the instant case because neither Judge Stern nor the Third Circuit concluded the General Counsel's legal theory was wrong.

could not deny an injunction simply because it ultimately disagreed with the theory. (Emphasis added.) The Third Circuit cautioned, however, that its ruling "[did] not mean that a district court must always grant an injunction even though it disagrees with the Board's legal theory." 475 F.2d 207. Obviously if the court was convinced that the General Counsel's legal theory was wrong it would not find the theory to be substantial and not frivolous in the first place.

Finally, the First, Sixth and Tenth Circuits also take the Third Circuit's approach to §10(l). *Union de Tronquistas de Puerto Rico v. Arlook*, 586 F.2d 872, 876 (1st Cir. 1978) (Legal theories "must not be without substance." (Citing the Third Circuit's opinion in *Hirsch*, 530 F.2d at 302)); *AFTRA v. Getreu*, 258 F.2d 698, 701 (6th Cir. 1958) (Reasonable cause required, but courts "cannot, and should not try to, usurp the function and duty of the Board. Nor should [they] endeavor to speculate on the law or facts which may eventually underlie the Board's decision. (Citing *Douds v. Milk Drivers and Dairy Employees Union*, 248 F.2d 534, 538 (2d Cir. 1957))"); and *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967) (General Counsel must have probable cause to believe a violation of the Act exists.)

b. Just and Proper Criteria

The Third Circuit has always recognized district court authority to tailor "just and proper" injunctive relief to effectuate the purposes of the Act. *Schauffler v. Local 1291, International Longshoremen's Association*, 292 F.2d 182, 186, n. 4 (3rd Cir. 1962). In the instant case the Third Circuit noted the "drastic" alteration in the status quo and the virtual elimination of freight consolidators which enforcement of the Rules would cause. It even recognized equitable circumstances which although not present in

the instant case, would justify denying an injunction. (App. A at 8a) The Third Circuit has never directed district courts "to disregard equitable considerations in the §10(l) setting," nor ruled that "if the district court finds 'reasonable cause,' the issuance of the injunction is automatically 'just and proper'." (Pet. at 12) Petitioners cite no Third Circuit precedent in support of their assertions.

There is no real and tangible conflict in the circuits over the scope of a district court's power to issue a "just and proper" injunction. No circuit holds that a district court before issuing §10(l) relief may review *de novo* the traditional equitable considerations already balanced by Congress in enacting §10(l). Even in *Danielson v. Jt. Bd. of Coat, Suit & Allied Garment Workers, supra*, the Second Circuit made it clear that there was no major distinction between the role of the court in determining if there existed a "reasonable cause to believe" a violation was occurring and if it was "just and proper" to issue an injunction, except for purposes of the standard of appellate review. The Court simply held that in one of those phrases existed "the principle of requiring a showing, perhaps of not of probability of success but at least of some significant possibility that the Board will enter an enforceable order, or on both." 494 F.2d at 1244. Judge Stern recognized below that both the General Counsel and the Respondents could meet this test. Therefore, even under the Second Circuit's standards for an injunction Judge Stern's injunction is proper.

Congress intended to prevent interference to the free flow of commerce by a §10(l) injunction until the Board ruled on the merits of the dispute despite the equitable positions of the private parties. However, the courts were charged to exercise their equitable power to effectuate the policies of the Act when issuing the injunction. For ex-

ample, in *Union de Tronquistas de Puerto Rico v. Arlook*, 586 F.2d at 878 it was held:

> "In determining whether such relief is 'just and proper,' the court is concerned principally, not with the protection of private interests from irreparable injury, but rather with effectuating the policies of the Act. (Citations omitted.) Thus, the claim that the evidence would not support a finding of irreparable harm to Andino is largely beside the point."

In *Hendrix v. International Union of Operating Engineers, Local 571*, 592 F.2d 437, 445 (8th Cir. 1979) enjoining picketing for all purposes was held to be overly broad. In *Kaynard v. Local 282, Teamsters*, 576 F.2d 471, 478 (2d Cir. 1978) the injunction was issued on basis of reasonable cause without traditional balancing of the equities. *See also, Kennedy v. Los Angeles Typographical Union No. 174*, 418 F.2d 6 (9th Cir. 1969) wherein an injunction was granted as requested without traditional balancing of the equities. In *Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525, 531 (9th Cir. 1965) it was held that an injunction was the best method for avoiding disruption of commerce. Likewise, in *Humphrey v. International Longshoremen's Association*, 548 F.2d 494 (4th Cir. 1977), the injunction was found to be the best method for avoiding the disruption caused by Rules.

Other than *Danielson v. International Brotherhood of Electrical Workers, Local Union No. 501*, 509 F.2d 1371 (2d Cir. 1975), Petitioners cite no case in which a court has actually denied injunctive relief on equitable grounds. Even in that case the Court did not apply the standards of Rule 65 of the Federal Rules of Civil Procedure, which Petitioners have urged should have been done below. (Pet. at 11) All the court did was to recognize there was "no real danger of irreparable harm to the public interest in

the limited period until the Board rules in the pending unfair labor practice proceeding." 509 F.2d at 1375. Furthermore, the threat to interstate commerce was almost moot and the injunction was not necessary to maintain the free flow of commerce. The Third Circuit in its opinion below acknowledged that precisely these circumstances would justify denying injunctive relief under the "just and proper" test. (App. A at 8a) The circuits simply do not disagree on the interpretation of "just and proper." Moreover, the record in this case made it just and proper for the injunction to issue and prevent the Rules from interrupting the free flow of commerce until the NLRB has completed its review of the merits of the case as directed by this Court in its remand.

3. The Instant Case Raises No Unsettled Questions of Constitutional Law

In enacting Section 10(l), Congress balanced the tremendous harm to the free flow of commerce effected by secondary boycotts against the potential harm to employees effected by the temporary halting of their boycott. It chose to limit, but not eliminate, a district court's discretion to grant §10(l) injunctions. It also chose to require the Board to petition a district court for temporary injunctive relief.

Congress could have bypassed the courts and granted the Board authority to temporarily prohibit continuation of a secondary boycott pending ultimate determination of the boycott's legality. *United States v. Southwestern Cable Company*, 392 U.S. 157 (1968); *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932). Congress may delegate questions "susceptible of judicial determination" to administrative agencies, particularly where, as here, they involve public, not private, rights.

Crowell v. Benson, 285 U.S. 22, 50-51 (1932); *Hirsch*, 530 F.2d at 308.[9]

Under Article I, Section 8, of the United States Constitution Congress may ordain and establish inferior courts, and "[invest] them with jurisdiction either limited, concurrent, or exclusive, and [withhold] jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Congress' authority to withhold jurisdiction, "in the exact degrees and character" it sees fit includes the authority to prescribe the standards by which a district court may issue injunctive relief in particular situations, including those underlying §10(l). *Douds v. Local 1250*, 170 F.2d 695 (2d Cir. 1948); *Printing Specialties and Paper Converters Union v. LeBaron*, 171 F.2d 331 (9th Cir. 1948), *cert. dismissed*, 336 U.S. 949 (1949).

The Supreme Court has applied these principles in a closely analogous case to reject the very constitutional argument which Petitioners raise. In *United Steelworkers of America v. United States*, 361 U.S. 39 (1959), a case involving the interpretation of §208 of the Labor Management Relations Act, the Court said: "Congress has resolved the question of the appropriate form of relief for the condition the statute is meant to correct" and has constitutionally made it mandatory that an injunction issue when certain facts are shown to exist. 361 U.S. at 59 (Justices Frankfurter and Harlan concurring.) The Court

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9. *Yakus v. United States*, 321 U.S. 414 (1944), relied upon by Petitioners, is not to the contrary. The Court there recognized Congress' broad authority to delegate powers to independent agencies: "The only concern of courts is to ascertain whether the will of Congress has been obeyed." 321 U.S. at 525. District courts must determine whether a regional director has reasonable cause and tailor just and proper relief. The merits of the Board's final resolution of a controversy are reviewable by the court of appeals under §10(e), 29 U.S.C. §160(e).

has upheld other similar congressional restrictions on a district court's equitable and judicial discretion. *Prima Paint Corp. v. Flood and Conklin Manufacturing Co.*, 388 U.S. 395 (1967); *Pope v. United States*, 323 U.S. 1, 10-12 (1944). *See also, Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657 (6th Cir. 1972).

Finally, the Third Circuit does not require the district court to abdicate its judicial function. By merely taking evidence to compute and enter a judgment due a court performs a judicial act. *Pope v. United States, supra.* Here, the district court must further conclude that a regional director has shown reasonable cause under what the court determines is a substantial and not frivolous legal theory. The district court may then tailor the injunction to effectuate the purposes of the Act. Each duty requires exercise of judicial power.

4. Petitioners' Jurisdictional Argument Raises No Substantial Legal Questions

Effectuation of an appeal of a final order of the Board does not forever relegate the judicial power to entertain the controversy exclusively to the court of appeals. The Third Circuit appropriately rejected Petitioners' frivolous contrary position. The following reasons, in addition to those stated in the Third Circuit's opinion, support its conclusions.

Sears, Roebuck and Co. v. Carpetlayers Local 419, 397 U.S. 655, *reh. denied*, 399 U.S. 917 (1970), cited by Petitioners, teaches not only that Section 10(l) relief expires on the Board's adjudication of the merits of the charge, but also that Congress enacted §10(l) to supplement §10(e) so that an aggrieved party could obtain relief prior to a final order by the Board. In the instant case, ATA and the NVOCCs, parties not even involved in the case

remanded by *NLRB v. ILA*, filed the charges which resulted in the Board's §10(l) petition. As new charging parties, they are entitled to have their cases considered, and the secondary boycott against their members enjoined until after a final order of the Board.

Great Western Broadcasting Corp. v. Hoffman, 214 F.Supp. 173 (N.D. Cal. 1963), cited by Petitioners, is inapposite.[10] There, a charging party sued to compel the General Counsel to petition for Section 10(l) relief after the Board's final order dismissing the same charges by the same charging party had been accepted for and was under review by a court of appeals pursuant to §10(f). The earlier Section 10(l) injunction had automatically dissolved on the Board's final order. Since the charging party merely sought to resurrect §10(l) relief during the pendency of the appeal, it was held that the case was within the jurisdiction of the court of appeals.

In the instant case, the Board is presently considering the remanded Board cases, as well as the December, 1980, charges which challenge new conduct not previously considered in the remanded cases. Following *NLRB v. ILA, supra*, the United States Court of Appeals for the District of Columbia Circuit did not even deem it necessary to order the *Associated Transport, Inc.* and *Dolphin Forwarding, Inc.* cases transferred to the Board. The Court viewed the transfer as automatic. (*Amicus* App. B; 9/10/80 letter from George A. Fisher, Clerk of the United States

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10. The general rule that an appeal to a circuit court deprives a district court of jurisdiction as to matters involved in the appeal is not a creature of statute and is not absolute in character. *Hoffman v. Beer Drivers and Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976).

Court of Appeals for the D.C. Circuit to Elliott Moore, office of the Board's General Counsel) The Board clearly has jurisdiction of the Rules controversy since it has issued no final order. That jurisdiction includes the requirement that it petition a district court for §10(l) relief. Petitioners' "novel jurisdictional issue" simply does not exist.

CONCLUSION

All circuits of the court of appeals agree on the proper interpretation of §10(l). Each defers to the Board's role as ultimate arbiter of labor disputes under the Act by granting the Board the benefit of the doubt on both issues of fact and law. Each considers equitable factors in molding injunctive relief to effectuate the purposes of the Act. The Supreme Court has not itself interpreted §10(l), but given the circuits' uniform approach to that section it need not do so.[11] [12] The petition should be denied.

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11. The Board has ordered expedited consideration of the old and new Rules unfair labor practice cases. The General Counsel has never indicated that the Board will not decide the case "for several years." (Pet. at 16-17) Joseph E. Mayer, Esq., Assistant General Counsel for the Board, stated at the February 23, 1981, hearing that it would not surprise him if the case took two years to decide, but that he hoped "it could be done in a briefer period of time . . ." (App. C at 175a) The hearing before the administrative law judge has been held, briefs have been filed and the parties are awaiting his decision.

12. Given the uniformity in approach to §10(l), Petitioners' suggestion that the Board may forum shop for §10(l) relief is misguided and unsupported by the practice of the General Counsel.

Respectfully submitted,

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AMICUS CURIAE APPENDIX A

United States Constitution, Article I, Section 8

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To makes Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. (Emphasis added)

SEP 16 1980

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
Washington, D. C. 20001

George A. Fisher
Clerk

September 10, 1980

Elliott Moore, Esquire
Office of the General Counsel
National Labor Relations Board
Washington, D.C. 20570

Re: Appeal No. 77-1735, et al. - *International Longshoremen's Assoc., AFL-CIO v. NLRB*

Dear Mr. Moore,

Confirming telephone advice to your office today, this Court's mandate in the above-referenced case was issued to the National Labor Relations Board on January 2, 1980. Subsequent to the issuance of this mandate, the Supreme Court granted a petition for writ of certiorari in these cases and affirmed the judgment of this Court on July 30, 1980. In my view, the mandate of this Court, previously issued in January, remains in full effect. Please let me know if you feel otherwise.

Sincerely yours,

/s/ George A. Fisher
George A. Fisher
Clerk

GAF/tag
cc: counsel of record